

This Opinion is not a  
Precedent of the TTAB

Mailed: October 26, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Grumpy Cat Limited*

Serial No. 85838010

Serial No. 85836812

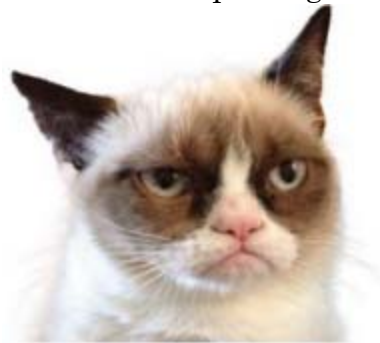
Kia Kamran of Kia Kamran PC, for Grumpy Cat Limited.

Deborah E. Lobo, Trademark Examining Attorney, Law Office 109, Michael  
Kazazian Managing Attorney.

Before Kuhlke, Cataldo, and Goodman,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Grumpy Cat Limited (“Applicant”) seeks registration on the Principal Register of the



following image as a special form mark<sup>1</sup>

for

<sup>1</sup> A photograph may be an acceptable drawing of a special form mark if it accurately depicts the mark and does not show additional matter that is not part of the mark. TMEP § 807 (October 2017). We observe that just as a particular image or photograph of an individual may be a valid trademark if used consistently on specific goods and services, a photograph of

the following goods and services:

Digital materials, namely, downloadable video files featuring comedy; computer application software for mobile phones, namely, software for games and distributing images, videos and information in International Class 9.<sup>2</sup>

Paper goods, namely, posters, art prints, note cards, greeting cards, Christmas cards, postcards, postage stamps, calendars in International Class 16.<sup>3</sup>

Stuffed and plush toys; action figures; dolls; toy animals in International Class 28.<sup>4</sup>

Entertainment services, namely, providing a website featuring non-downloadable photographic, audio, video

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an animal may be a valid trademark if used consistently on specific goods and services. *See Pirone v. MacMillan Inc.*, 894 F.2d 579, 13 USPQ2d 1799, 1801 (2d Cir. 1990); *Brooks v. Topps Co.*, 86 USPQ2d 1361, 1367 (S.D.N.Y. 2007) (“photographs are not inherently distinctive” and are “protected only if, through usage, they have acquired distinctiveness and secondary meaning.”) (citing *Pirone*, 13 USPQ2d at 1801). *See also In re Elvis Presley Enterprises Inc.*, 50 USPQ2d 1632, 1633-34 (TTAB 1999) (discussing whether the likeness of an image *in general* of Elvis Presley serves as a mark) (citing *Pirone*, 13 USPQ2d at 1801).

<sup>2</sup> Application Serial No. 85838010 ('010 application) was filed on January 31, 2013, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as November 8, 2012 for the Class 9 goods.

<sup>3</sup> '010 application based upon Applicant's claim of first use anywhere and use in commerce since at least as early as November 9, 2012 for the Class 16 goods.

<sup>4</sup> Application Serial No. 85836812 ('812 application) was filed on January 30, 2013 based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). An amendment to allege use was filed on January 22, 2015 alleging first use anywhere and use in commerce since at least as early as November 30, 2013 for the Class 28 goods.

Both applications include the following description of the mark and color statement:

“The mark consists of the head and neck of a white feline with brown and black ears. The cat has green eyes with black pupils. Surrounding each eye of the cat is an irregular shaped circle consisting of brown, black and beige fur. The cat has white fur above its nose and surrounding its mouth. Its nose and mouth are outlined in pink and black. The cat's mouth is in a frown. Surrounding the mouth are white whiskers.” “The colors white, beige, brown, black, green, and pink are claimed as a feature of the mark.”

and prose presentations in the field of comedy in International Class 41.<sup>5</sup>

In both applications, the Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the image is merely descriptive of the goods and services and that Applicant has failed to establish acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).<sup>6</sup> When the refusals were made final, Applicant appealed and requested reconsideration in both applications. After reconsideration was denied, Applicant sought consolidation of the appeals, which was granted by the Board.<sup>7</sup> After consolidation, Applicant requested a remand to the Examining Attorney to consider new evidence of acquired distinctiveness. Jurisdiction was restored to the Examining Attorney, but the Examining Attorney maintained the final refusals and the consolidated appeals resumed. We affirm the refusals to register.

## I. Background

Grumpy Cat is the nickname given to Tardar Sauce, an actual housecat shown in the applied-for mark and publicly available images with a frowning facial expression.

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<sup>5</sup> '010 Application, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as September 27, 2012 for Class 41 services.

<sup>6</sup> The section 2(f) claim was made in the alternative. '010 Application January 24, 2013 Response to Office Action, p. 1; '812 application, June 19, 2014 Response to Office Action, p. 1.

<sup>7</sup> We refer to the briefs and record in the '010 application unless otherwise noted.

Tardar Sauce became an Internet meme after pictures of her were posted on Reddit.com in September 2012.<sup>8</sup>



<sup>8</sup> '010 application, December 26, 2013 Response to Office Action, pp. 1, 7 (statement of counsel and exhibit); '812 application, November 18, 2013 Response to Office Action, pp. 1, 2, 13, 20 (statement of counsel, and corroborating exhibits). A meme is “an idea, behavior, style or usage that spreads from person to person within a culture.” *Id.* at p. 2. *See also* Random House Dictionary (2018), [www.dictionary.com](http://www.dictionary.com). (A meme is defined as “a cultural item in the form of an image, video, phrase, etc., that is spread via the Internet and often altered in a creative or humorous way.”). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

<sup>9</sup> Reddit page posting of Tardar Sauce image that became a meme. '010 application, December 26, 2013 Response to Office Action, p. 7. Following is an example of the Reddit posted image of Tardar Sauce altered in humorous way (meme) by captioning the image with a statement



from the cat's point of view. *Id.* at 22.

## II. Section 2(e)(1), Mere Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration of a mark that, when applied to the goods or services of the applicant, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). A term, or an image, in this case, “is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978). An accurate pictorial depiction, such as an illustration or photograph, is considered just as descriptive as a word if it conveys information as to the content, subject matter, feature or characteristic of the goods or services. *See, e.g., In re Swatch Grp. Mgmt. Servs. AG*, 110 USPQ2d 1751 (TTAB 2014) (both the word Tourbillon and the design portion of the mark, which represents a tourbillon, merely descriptive of applicant’s goods); *In re Soc’y for Private and Commercial Earth Stations*, 226 USPQ 436 (TTAB 1985) (pictorial representation of a satellite dish held merely descriptive of an association promoting the interests of members of the earth station industry); *In re Underwater Connections, Inc.*, 221 USPQ 95, 95 (TTAB 1983) (pictorial representation of a compressed air gas tank held merely descriptive of travel-tour services involving underwater diving). A mark or image need not describe all of the characteristics, attributes or functions of a product or service to be considered merely descriptive; it need only describe “one significant function or attribute or property.” *In re Bright-*

*Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Descriptiveness of an image is not considered in the abstract but is considered in relation to the particular goods or services for which registration is sought, the context in which it is being used, and the possible significance that the image would have to the average purchaser of the goods or services because of the manner of use or intended use. *In re Bayer*, 82 USPQ2d at 1831 (citing *In re Abcor* 200 USPQ at 216). *See also In re Chamber of Commerce*, 102 USPQ2d at 1219.

#### A. Arguments and Evidence

The Examining Attorney's position is that the design or image of the cat, in the same way as the legally equivalent word "cat," merely describes a feature of the goods and services, because "applicant's Class 28 toys are in the shape or form of a cat and applicant's Class 9, 16 and 41 goods and services all feature subject matter in the form of images and content relating to cats," particularly, "a cat that resembles the cat shown in the mark."<sup>10</sup> The Examining Attorney also argues that stuffed toys in the shape or form of cats, downloadable videos and software featuring cats or cat-themed content, and calendars, postage stamps, prints and cards featuring cats or

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<sup>10</sup> 21 TTABVUE 9, 10. As indicated, the Examining Attorney does argue that Applicant's mark describes the subject matter of the goods and services because it features the specific Tardar Sauce image: "applicant's mark ... is unregistrable on the Principal Register, without evidence of acquired distinctiveness, because the subject matter of applicant's goods and services is a cat, and in particular, a cat that resembles the cat shown in the mark." 21 TTABVUE 9; '010 application, June 27, 2013 Office Action, p. 1 ("the design ... merely describe[s] a feature and characteristic of the goods and services, that is, the subject matter of the goods and services is the cat depicted in the mark."); '812 application, July 22, 2014 Office Action, p.1 ("Applicant's argument that the mark is not descriptive ... is not persuasive. ... Moreover, as the evidence of record shows, the goods are stuffed or plush cats that are intended to resemble or depict the cat shown in the mark.").

cat themes are common in the marketplace.<sup>11</sup> As to the Class 41 entertainment services, the Examining Attorney notes that third-party websites feature “funny cat videos, video clips, cat stories, cat photos and pictures and cat jokes,” showing that the word “cat” is necessary to describe the content and subject matter of the goods and services.”<sup>12</sup>

Applicant, on the other hand, argues that “Applicant’s Mark is not a standard depiction of a generic cat, nor is it for actual cat goods, or cat services, rather, it is a distinctive depiction of a frowning and quite unusual looking cat—a cat which is actually famous precisely due to its unusual look.”<sup>13</sup> Applicant contends that the applied-for image rises above mere descriptiveness of an image of a cat because of an incongruous combination of descriptive elements (“coloring” and “frowning expression”) that creates an unusual and unique result.<sup>14</sup> Applicant asserts that due to its uniqueness, the applied-for mark (hereinafter referred to as the “Tardar Sauce image”) “is more like a stylized representation” of a cat which is registrable.<sup>15</sup> Applicant also argues that “[t]he Examining Attorney has indiscriminately applied the *legal equivalent doctrine* to state that the Mark equals the word ‘CAT’” and provided no evidence that competitors use or need to use the particular image

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<sup>11</sup> *Id.* at 14-15.

<sup>12</sup> *Id.* at 16.

<sup>13</sup> 19 TTABVue 12.

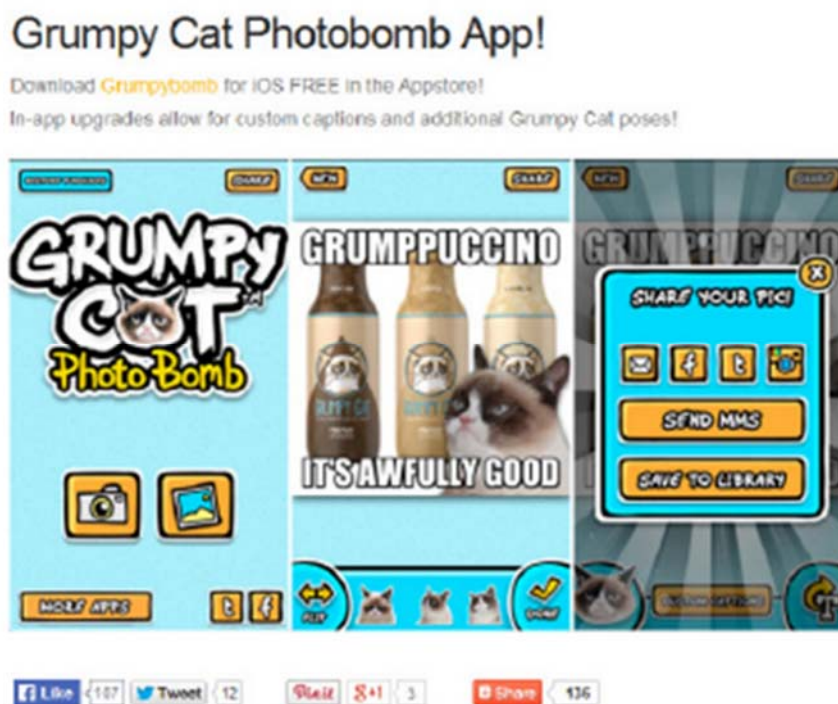
<sup>14</sup> *Id.* at 15-16.

<sup>15</sup> *Id.* at 12.

comprising the applied-for mark.<sup>16</sup> (emphasis in original). Applicant submits that the Tardar Sauce image “do[es] not immediately call to mind cat goods and services.”<sup>17</sup>

As provided in the record, photographs of some of the involved goods and advertisements for the involved goods and services are reproduced below.

Class 9 computer application (“app”) software for mobile phones:



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<sup>16</sup> *Id.* at 11-14 (emphasis in original).

<sup>17</sup> *Id.* at 12.

<sup>18</sup> '010 application, August 23, 2014 Office Action, p. 149.





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Class 16 postage stamps, calendars and greeting cards:



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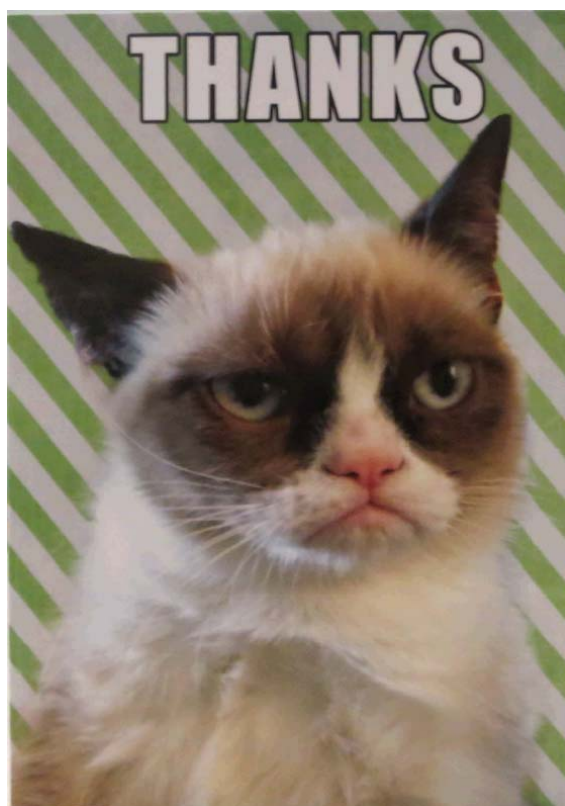
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<sup>19</sup> '010 application, August 23, 2014 Office Action, p. 148.

<sup>20</sup> '010 application, August 23, 2014 Office Action, p. 96. The Tardar Sauce image on a United States Postal Service stamp is displayed on the United States Postal Service web page with other "cat postage stamps," and identified as "custom postage." *Id.*



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<sup>21</sup> '010 Application specimen.

<sup>22</sup> '010 Application specimen, July 22, 2014 Response to Office Action, p. 6.

Class 28 goods:



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<sup>23</sup> '812 Application specimen.

<sup>24</sup> '812 application, January 22, 2015 Response to Office Action, p. 35.

<sup>25</sup> '812 application, January 22, 2015 Response to Office Action, p. 27.

<sup>26</sup> '812 application, January 22, 2015 Response to Office Action, p. 35.

<sup>27</sup> '812 application, January 22, 2015 Response to Office Action, p. 27.

Class 41: website featuring non-downloadable video presentations:



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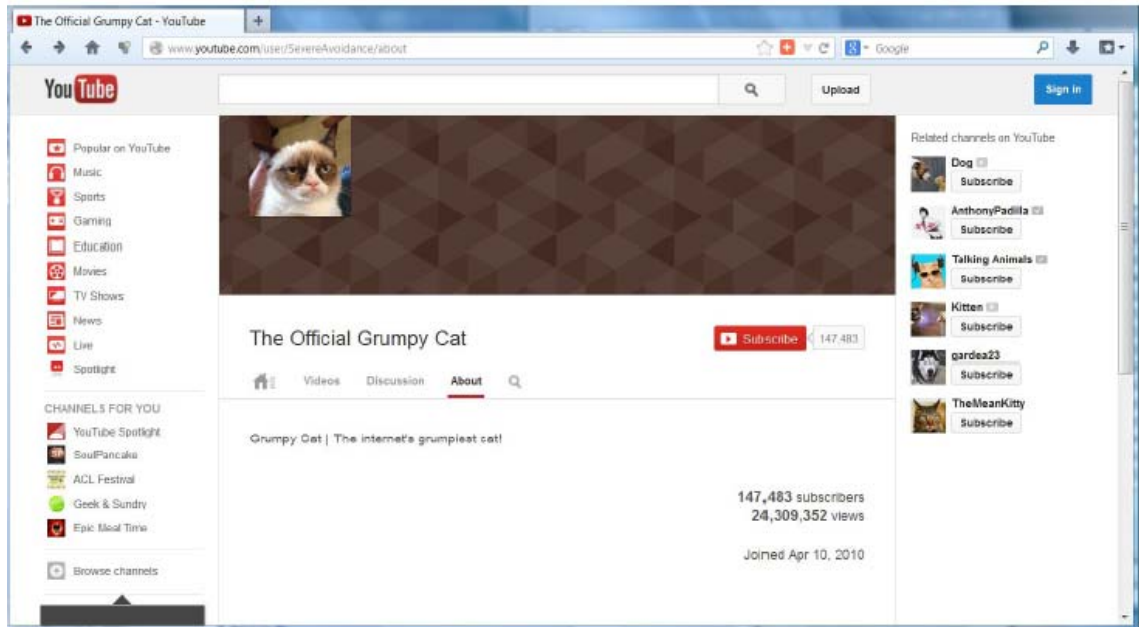


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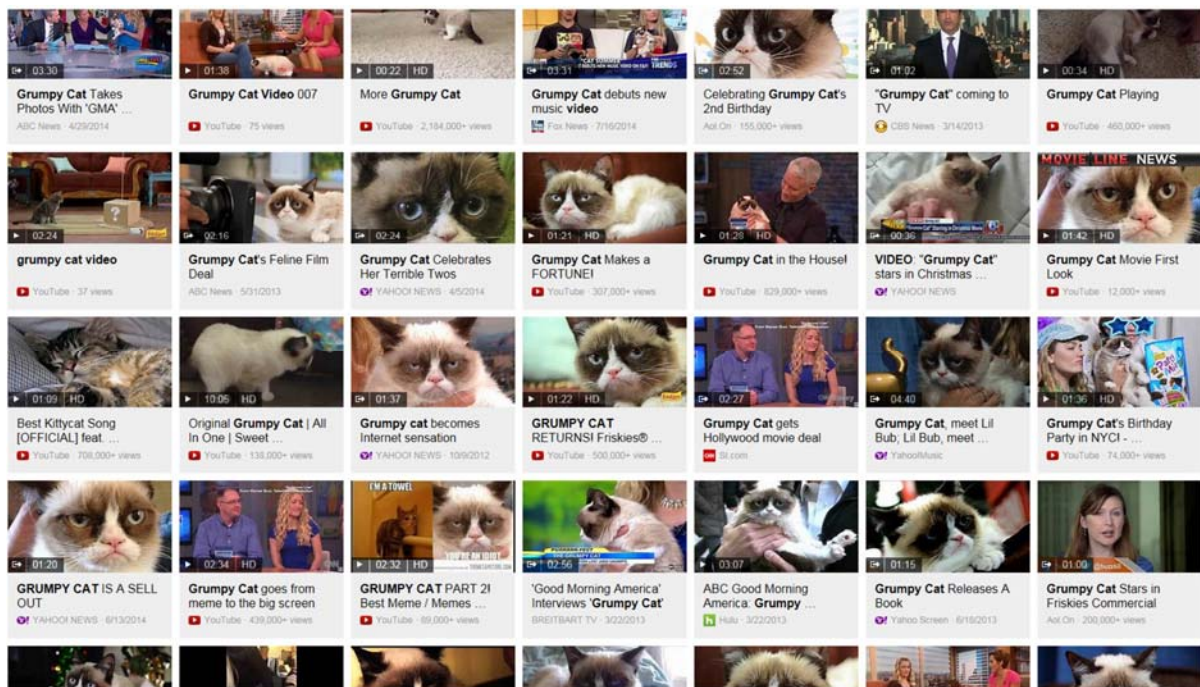
<sup>28</sup> '010 application specimen; '010 application, July 22, 2014 Response to Office Action, p. 11.

<sup>29</sup> '010 application, June 27, 2013 Office Action, p. 9.





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<sup>30</sup> '010 application, December 26, 2013 Response to Office Action, p. 34.

<sup>31</sup> '010 application, August 23, 2014 Office Action, pp. 157-160.

## B. Analysis

As an initial matter, we find the Examining Attorney's invocation of the "legal equivalents" doctrine to be inapposite in this case. An image or design and the word(s) which identify or describe the design may be legal equivalents that conjure up the same mental image to prospective purchasers. *Thistle Class Ass'n v. Douglass & McLeod, Inc.*, 198 USPQ 504, 511 (TTAB 1978) (citing *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963) and cases cited therein); *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). In *Thistle Class Ass'n.*, the Federal Circuit's predecessor court held that the term THISTLE and an emblem depicting a thistle were legal equivalents used to describe a class of sailboats. The court's holding was based on the fact that applicant and opposer, as well as numerous third parties, had used the two marks consistently with one another over a period of several decades to designate a specific class of sailboat. There is no similar evidence of longstanding and simultaneous use of the purported equivalents in this case. Additionally, we do not believe that the question of descriptiveness can be resolved simply by equating the realistic cat image with the word "cat" and then finding that it describes any products or services relating to cats generally, or grumpy looking cats, specifically.<sup>32</sup> There are undoubtedly many ways to graphically depict a grumpy looking cat that are substantially different in appearance from Applicant's applied-for mark.

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<sup>32</sup> Most of the Examining Attorney's Internet evidence shows goods and services similar to Applicant's, featuring photographic images of cats (unrelated to Tardar Sauce) or cat illustrations as the subject matter or content. This evidence is not probative.

Depictions of cats can be of many breeds and varieties, and feature many different colors or color combinations, and Applicant's applied-for mark is based on a drawing that is limited to a particular cat, with the accompanying description that, while not specifying a breed or type of cat, describes a cat with particular colors in particular places.

As to Applicant's arguments regarding the Examining Attorney's lack of evidence of "competitor need" or "competitor use," the relevant standard requires only that we consider whether the image conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016) (no requirement that the Examining Attorney prove that others have used the mark at issue or need to use it); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (same). It is well established that even if an applicant is the only user of a merely descriptive term, design, or image, this does not render that term, design, or image distinctive, if it otherwise conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *Pierce Arrow Motor Car Co.*, 55 F.2d 434, 12 USPQ 315, 316 (CCPA 1932); *In re Fat Boys*, 118 USPQ2d at 1514; *In re Swatch Grp.*, 110 USPQ2d at 1761 n.50 (citation omitted). *See also Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (even novel ways of referring to a product may nonetheless be merely descriptive).

Applicant has also argued that *In re D.C. Comics, Inc.*, 689 F.2d 1042, 215 USPQ 394 (CCPA 1982) is applicable to the Class 28 refusal. We find that case is

distinguishable. The issue presented on appeal in *In re D.C. Comics* was whether drawings of fictional comic book characters Superman, Batman and Joker could function as trademarks for toy doll figurines of those characters. The Federal Circuit's predecessor court found that such marks were registrable for a doll made in the form of the character. Here, the issue is not whether the Tardar Sauce image fails to function as a trademark for the Class 28 stuffed toys. Rather, we are presented with the simpler question of whether the Tardar Sauce image is merely descriptive of a stuffed or plush toy intended to represent her.

Lastly, we are unpersuaded by Applicant's arguments that the Tardar Sauce image is akin to a highly stylized image. *Cf. Allen v. Men's World Outlet Inc.*, 679 F. Supp. 360, 5 USPQ2d 1850, 1855 n.12 (S.D.N.Y. 1988) (photographic likeness of humans not arbitrary or fanciful). The image is a photographic likeness or portrait of an actual cat and is not a highly stylized image or a fanciful cartoon character. *Cf. Pirone* 13 USPQ2d at 1801 (a portrait of a cartoon character is fanciful while a portrait of a human being is not; "an individual's likeness is not a consistently represented fixed image—different photographs of the same person may be markedly dissimilar").<sup>33</sup>

We now consider whether the Tardar Sauce image is merely descriptive as used in connection with the applied-for goods and services.

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<sup>33</sup> The fact that the Tardar Sauce image is not fanciful is borne out by the multitude of photographic images in the record of Tardar Sauce which are dissimilar from the applied-for image.



*Class 9 Goods*

As to the Class 9 goods, we find the Examining Attorney's evidence probative to support the position that the Tardar Sauce image is merely descriptive of these goods. As shown in the marketing materials, a significant feature of the "photo bomb" app software is the ability to insert images of Tardar Sauce into photographs; in connection with the weather application, a consumer may specifically download a Tardar Sauce theme. Specifically, the applied-for mark is a significant feature or characteristic of the goods.

*Class 16 Goods*

As to Applicant's Class 16 goods, the evidence supports the Examining Attorney's position that the Tardar Sauce image describes the subject matter of the Class 16 goods. For instance, the evidence of record shows the Tardar Sauce image used as a significant feature of the stamps, greeting cards and calendars, all of which feature the cat image displayed as a decorative element of the product.

*Class 28 Goods*

As to the Class 28 goods, we find that the Tardar Sauce image is merely descriptive of the stuffed toy because a key feature, or characteristic of the stuffed toy is that it portrays Tardar Sauce.<sup>34</sup> The Tardar Sauce image used in connection with

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<sup>34</sup> In the '812 application, in connection with an information request, Applicant stated, among other things, that "[t]he goods are intended to be in the shape and form of the cat Grumpy Cat in particular, with the features and characteristics of specifically Grumpy Cat ... Applicant is not going to use the Mark with anything other than goods that depict the meme 'Grumpy Cat' .... When looking at Applicant's goods, consumers will know that they are looking at Grumpy Cat and not a generic cat." November 18, 2013 Response to Office Action, p. 1.

the tags or labels attached to these goods immediately conveys to the consumer information that the stuffed toy or toy animal is a portrayal of Tardar Sauce, which Applicant does not dispute.<sup>35</sup>

*Class 41 Services*

As to the Class 41 services, the evidence in the record establishes the subject matter or content of the entertainment services includes, and indeed focuses on, the cat identified in the mark. Thus, a significant feature of the content of the entertainment services (non-downloadable videos) is Tardar Sauce. Purchasers seeing the Tardar Sauce image in connection with the Class 41 services would immediately understand that the subject matter relates to this particular cat without the need for imagination or thought.

Thus, we find that the Tardar Sauce image is merely descriptive of the Class 9, 16 and 28 goods and the Class 41 services within the meaning of Trademark Act Section 2(e)(1).

III. Acquired Distinctiveness in the Alternative

In support of its alternative claim of acquired distinctiveness, Applicant has submitted a claim of ownership of prior Registration No. 4820434 as well as asserted evidence of acquired distinctiveness. We therefore consider whether the Tardar Sauce

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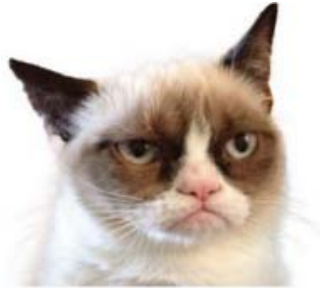
<sup>35</sup> In the '812 application, Applicant stated "just because a depiction of Grumpy Cat in the form of the Mark on a tag ... may impart to the consumer aspects of how the toys attached to the tag might look, this does not prevent the Mark from functioning as a trademark." The question here, though, is whether the Tardar Sauce image is merely descriptive, not whether it functions as a mark. We view this statement as an implicit concession that the image on the tag conveys information about the plush toys. June 19, 2014 Response to Office Action, p.1.

image has acquired distinctiveness in connection with the Class 9, 16, and 28 goods and the Class 41 services.

A. Prior registration

In appropriate cases, prior registrations on the Principal Register of the same mark may be accepted as prima facie evidence of acquired distinctiveness if the goods or services in the registration(s) are sufficiently similar or related to the goods or services in the application. Trademark Rule 2.41(a)(1), 37 C.F.R. § 2.41(a)(1); *In re Olin Corp.*, 124 USPQ2d 1327, 1334 (TTAB 2017). In relying on this rule, an applicant is essentially seeking to tack the use of the registered mark to its use of the present mark for purposes of transferring distinctiveness to the new mark. *In re Brouwerij Bosteels*, 96 USPQ2d 1414, 1423 (TTAB 2010) (citation omitted). The analysis used to determine whether Applicant's present mark is "the same mark" as its previously registered mark, for purposes of the rule, is the analysis used in tacking cases. *Id.* Tacking is a factual question that considers whether two marks are legal equivalents, i.e., whether the marks "create the same continuing commercial impression so that consumers consider both as the same mark." *Hana Financial, Inc. v. Hana Bank, Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 113 USPQ2d 1365, 1366-67 (2015). Aside from the legal equivalency of the marks in the registration(s) and the application, if the similarity or relationship between the goods or services is not self-evident based on the respective identifications in the registration and application, the purported similarity between the goods or services must be established through submission of relevant evidence and an explanation. TMEP § 1212.04(c).

Applicant owns a prior registration, Reg. No. 4820434, for the Tardar Sauce image, as a mark, reproduced below



for the following goods:

Class 9: Protective covers and cases for cell phones, laptops, tablet computers and media players; mouse pads; decorative magnets, refrigerator magnets.

Class 21: Merchandise, namely, mugs, coffee mugs, porcelain mugs, beer mugs, beer steins, travel mugs, commuter mugs, mugs not of precious metal, coffee cups, tea cups, coasters not of paper and not being table linen.

Class 25: Clothing, namely, t-shirts, shirts, long-sleeved shirts, polo shirts, sweatshirts, hoodies.

Class 28: Playing cards.

Applicant argues that its prior registration “for the exact same mark” supports a claim of distinctiveness because the goods in the prior registration are sufficiently similar to the Class 9 and 16 goods and Class 41 services in the ’010 application and the Class 28 goods in the ’812 application.<sup>36</sup> In particular, Applicant argues that the

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<sup>36</sup> The registration was the result of a request to divide the ’010 application, as the Examining Attorney withdrew the refusal as to Class 9 protective covers, mouse pads and magnets and did not issue a refusal for Class 21 and 25 goods. January 30, 2015 Request to Divide, p. 1; August 23, 2014 Office Action, p. 1; June 27, 2013 Office Action, p.1. Notwithstanding that the Office strives for consistency, Applicant’s ownership of a registration for the Tardar Sauce image on the Principal Register for these goods does not require a different result. “The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement ... even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632,

Class 9 protective covers and cases, mouse pads and magnets are sufficiently similar to its Class 9 downloadable videos and application software; its Class 21 mugs, coffee cups, tea cups and coasters (not of paper) are sufficiently similar to the Class 16 paper goods; its Class 25 clothing is sufficiently similar to its Class 41 entertainment services; and its Class 28 playing cards are sufficiently similar to its Class 28 stuffed or plush toys, action figures, dolls and toy animals. Aside from these conclusory statements, Applicant does not explain how the goods in the prior registration are sufficiently similar or related. Applicant also submitted copies of third-party registrations, three for each class, as its only evidence that the goods listed in the prior registration are related to the goods and services in the '010 and '812 applications and may emanate from the same source. Applicant has referenced the likelihood of confusion case *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) in support.<sup>37</sup>

Although the mark in Reg. No. 4820434 is the legal equivalent of the mark in the '010 and '812 applications, the goods and services in the '010 and '812 applications are not the same or similar, and the respective identifications in the prior registration

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1635 (Fed. Cir. 2016) (existence of subsisting incontestable standard character registration of CHURRASCOS for restaurant services on the Principal Register did not preclude finding that stylized CHURRASCOS mark was generic for the same restaurant services). *See also In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

<sup>37</sup> 14 TTABVUE 3.

and the '010 and '812 applications do not make the relatedness of the goods and services self-evident. We therefore consider whether Applicant's third-party registrations establish that there is a relationship between the prior registration's goods and the '010 and '812 applications' goods and services.

As to the Class 9 goods, the three third-party registrations show a variety of diverse goods in this class. These registrations are insufficient to establish relatedness. *See In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1511 (TTAB 2010) (the diversity of the goods identified in this registration diminishes the probative value in establishing that any two items identified in the registration are related).

A similar problem exists with two of the third-party registrations for Class 28, owned by the same registrant, covering a diverse variety of Class 28 goods including artificial Christmas trees, golf clubs, athletic wrist supports, party favors, and bounce houses. The single third-party registration that covers the Class 28 goods for both the prior registration and pending application is insufficient evidence within the context of the entire record to establish relatedness.

As to the Class 25 goods and Class 41 services, the third-party registrations submitted are not probative because none of the registrations recite the Class 41 services identified in the '010 application. Lastly, the third-party registrations that cover the Class 16 goods in the pending application and the Class 21 goods in the prior registration do provide some evidence of relatedness. But the respective nature and purposes of the Class 16 goods (stamps, notepads, posters, calendars, and greeting cards) and the Class 21 goods (mugs, cups and "coasters not of paper") are

entirely different. The Class 21 goods are used with beverages while the Class 16 goods are paper goods used to send correspondence, write notes, send greetings, for room decoration, or to keep track of the month and day. In the absence of additional evidence or explanation, we find the registrations are insufficient to establish relatedness for transference of acquired distinctiveness. *See* TMEP 1207.01(a)(vi) (describing types of evidence that may be included to show relatedness).

Thus, we agree with the Examining Attorney that the Class 9, 21 and 25 goods in the prior registration are not sufficiently similar or related to the Class 9, 16 and 28 goods and the Class 41 services in the '010 and '812 applications to support a claim of acquired distinctiveness based on a prior registration. To the extent Applicant argues that the Examining Attorney did not submit evidence as to the lack of relatedness of the goods and services, it is Applicant's burden, not the Office's, to prove distinctiveness in connection with a Section 2(f) claim. *See Yamaha Intern. Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988); *In re Meyer & Wenthe, Inc.*, 267 F.2d 945, 122 USPQ 372, 375 (CCPA 1959); *In re Rogers*, 53 USPQ2d 1741, 1744 (TTAB 1999).

#### B. Additional Evidence of Acquired Distinctiveness

We now consider Applicant's other evidence of acquired distinctiveness. Acquired distinctiveness is generally understood to mean an acquired "mental association in buyers' minds between the alleged mark and a single source of the product." *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017) (quoting 2 McCarthy on Trademarks and Unfair Competition § 15:5 (4th

ed., June 2017 Update)). The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case. *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). Acquired distinctiveness may be shown by direct and/or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers. *In re Ennco*, 56 USPQ2d 1279, 1283 (TTAB 2000). Evidence of acquired distinctiveness must “relate to the specific [goods or] services set forth in the application, and the specific mark for which registration is sought.” *In re K-T Zoe Furniture Inc.*, 16 F.3d 390, 29 USPQ2d 1787, 1789 (Fed. Cir. 1994).

Applicant’s evidence of acquired distinctiveness includes statements of counsel,<sup>38</sup> as well as declarations<sup>39</sup> (dated January 20, 2015 and February 23, 2015) from Susan

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<sup>38</sup> ’010 application, December 26, 2013 Response to Office Action, p.1; ’010 application, July 22, 2014 Response to Office Action, p. 1; ’010 application, February 23, 2015 Request for Reconsideration, p. 7; ’812 application, January 22, 2015 Request for Reconsideration, p. 6; ’812 application, June 19, 2014 Response to Office Action, p.1; ’812 application, November 18, 2013 Response to Office Action, p. 1. Neither an affidavit nor declaration was submitted from Applicant to support counsel’s statements regarding acquired distinctiveness of the Tardar Sauce image. It is preferable for an applicant to submit information of this nature in a declaration or affidavit signed by an officer of Applicant. We also have no foundational information about counsel’s investigation of, or understanding of, Applicant’s business that would put her in a position to make statements regarding Applicant’s marketing and promotional activities. We consider only those statements that are supported by documentary evidence or otherwise corroborated in the record. *In re Highlights for Children, Inc.* 118 USPQ2d 1268, 1276 (TTAB 2016) (citation omitted).

<sup>39</sup> Applicant submitted two declarations with each application. 19 TTABVUE 21; 4 TTABVUE 24-30.



O'Halloran, Communications Manager of Ganz, a licensee of Applicant for computer software applications, greeting cards, note cards and plush toys;<sup>40</sup> the declaration (dated February 20, 2015) of Lori Conley, Senior Director, Marketing Services of ACCO Brands USA LLC, a licensee of Applicant for boxed and miniature decorative wall calendars;<sup>41</sup> and the declaration (dated January 21, 2015) of Bruce Scott Raiffe, President of Gund Division of Enesco, for plush toys.<sup>42</sup>

In support of its Section 2(f) claim, Applicant argues that Tardar Sauce (a/k/a Grumpy Cat) is an “instant Internet celebrity” and has “garnered considerable fame, media attention, accolades, and merchandise licensing arrangements.”<sup>43</sup> In particular, Applicant has argued that:

through the Internet (where the meme of Grumpy Cat originated), “...a new trademark may achieve wide usage and ‘secondary meaning’ within a matter of days or weeks, compared to the many years required in the days of more leisurely advertising.” (quoting 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition at §§ 15:54 and 15:56 (4<sup>th</sup> ed.)) Indeed, “...the Internet has made it easier than ever to reach millions of people around the globe in a matter of seconds....” *Id.* Accordingly, the quick viral rise of the Mark on the Internet and its resulting use in advertising and on goods and services ... should be enough length of use to lend towards a showing of acquired distinctiveness.<sup>44</sup>

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<sup>40</sup> '010 application, February 23, 2015 Request for Reconsideration, pp. 20-23; '812 application, January 22, 2015 Request for Reconsideration, pp. 22-25.

<sup>41</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 24.

<sup>42</sup> '812 application, January 22, 2015 Request for Reconsideration, pp. 19-21.

<sup>43</sup> '010 application, December 26, 2013 Response to Office Action, p.1; '812 application, November 18, 2013 Response to Office Action, p.1.

<sup>44</sup> '010 application, July 22, 2014 Response to Office Action, p.1; '812 application, June 19, 2014 Response to Office Action, p. 1.

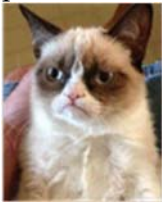
1. *Evidence Corroborating Statements of Counsel in Connection with Goods*

As stated, evidence of acquired distinctiveness must relate to the specific mark and the goods and services for which registration is sought and not relate to recognition of Tardar Sauce herself, as an “Internet celebrity.” *In re K-T Zoe Furniture*, 29 USPQ2d at 1789. *See also In re Franklin County Historical Society*, 104 USPQ2d 1085, 1093 (TTAB 2012) (“[A]lthough applicant’s museum services may attract many visitors and indeed it may have national recognition with multiple awards, it has not established acquired distinctiveness specific to the term “CENTER OF SCIENCE AND INDUSTRY.”). Applicant has submitted the following evidence through counsel regarding acquired distinctiveness:<sup>45</sup>

Tardar Sauce is the subject of a book called “Grumpy Cat: A Grumpy Book” that has been translated into other languages.<sup>46</sup>

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<sup>45</sup> ’812 application, November 18, 2013 Response to Office Action, p.1; ’010 application, December 26, 2013 Response to Office Action, p.1; ’812 application, January 22, 2015 Request for Reconsideration, p.1; ’010 application, February 23, 2015 Request for Reconsideration, p.1. Some of the news stories and articles appear to include the original Internet meme image



. ’010 application, December 26, 2013 Response to Office Action, pp. 18, 39; ’010 application, February 23, 2015 Request for Reconsideration, pp. 10-15; ’812 application, November 18, 2013 Response to Office Action, p. 18; ’812 application, January 22, 2015 Request for Reconsideration, pp. 9-14.

<sup>46</sup> The book is described as teaching “the fine art of grumpiness” and features “brand new as well as classic photos, and including grump-inspiring activities and games.” ’010 application, December 26, 2013 Response to Office Action, pp. 8-13. The cover of the book contains the Tardar Sauce image. Nonetheless, we conclude that consumers would view the cover image as nothing more than a cover photograph. *Cf. In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1953 (TTAB 2001) (book did not support acquired distinctiveness of guitar body; readers unlikely to regard round shouldered shape unique or to serve source identifying function). In

Tardar Sauce is the subject of a movie deal with Broken Road Productions. A story about the movie deal made the front page of the Wall Street Journal with Tardar Sauce portrayed as a stipple drawing.<sup>47</sup>

Tardar Sauce was on the cover of New Yorker magazine under the heading “Boom Brands,” was the subject of a news story in USA Today, and appeared in People Magazine.<sup>48</sup>

Tardar Sauce has appeared on various news and television shows including The Today Show, Good Morning America, Anderson Cooper Live, The Soup, CBS Evening News and TMZ.<sup>49</sup>

Tardar Sauce received press for becoming a “spokescat” for Nestle Purina PetCare’s Friskies brand.<sup>50</sup>

Tardar Sauce won the 2012 meme of the year (Webby awards), was awarded a Friskies Lifetime Achievement award, was named most influential cat of 2012 by MSNBC, most important Meme of 2012 by Mashable, and 2013 Queen of the South at the South West Interactive conference.<sup>51</sup>

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the ’812 application, Applicant argued in its January 22, 2015 Request for Reconsideration, p. 6 that the book (as well as Applicant’s licensed use on cat food) should be considered related to the Class 28 goods because the book (and the cat food) is displayed with the other goods at trade shows to show what goods Applicant has licensed and marketed together. However, we find the book image does not support the acquired distinctiveness of the applied-for goods and services as the average consumer would not likely regard the book and the Class 28 goods to be linked. *Cf. Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1575 (TTAB 2009) (examples of exposure through third-parties’ permitted or licensed use not supportive of acquired distinctiveness as it did not direct the attention of potential consumers to identify the proposed mark as an indication of commercial source).

<sup>47</sup> ’010 application, December 26, 2013 Response to Office Action, p. 14.

<sup>48</sup> ’010 application, December 26, 2013 Response to Office Action, pp. 15, 30.

<sup>49</sup> ’010 application, December 26, 2013 Response to Office Action, pp. 23-28.

<sup>50</sup> ’010 application, December 26, 2013 Response to Office Action, p. 18.

<sup>51</sup> ’010 application, December 26, 2013 Response to Office Action, pp. 19-22, 31.

Tardar Sauce appeared as part of an advertising campaign for Disneyland.<sup>52</sup>

While fame of a mark is relevant to secondary meaning, *In re Industrie Pirelli Societa Per Azioni*, 9 USPQ2d 1564, 1565 (TTAB 1988), Applicant conflates arguments about the fame of Tardar Sauce herself with the fame of the Tardar Sauce image as a trademark.<sup>53</sup> See e.g., *In re Franklin County Historical Society*, 104 USPQ2d at 1089 (although museum had achieved national recognition, it was unable to show acquired distinctiveness of “CENTER OF SCIENCE AND INDUSTRY”).

The foregoing evidence, while perhaps establishing recognition of Tardar Sauce herself as the subject of an Internet meme and an “Internet celebrity,” (or cat-lebrity)<sup>54</sup> does not establish recognition by consumers of the Tardar Sauce image as a trademark in connection with the applied-for goods and services. The examples of media coverage provided by Applicant are limited in number and describe the various activities of Tardar Sauce; they do not discuss the applied-for goods and services or the Tardar Sauce image. Likewise, Tardar Sauce’s personal appearances on television and at other venues appear unrelated to the goods and services in the involved applications and do not direct the attention of consumers or potential consumers to them. See *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1575 (TTAB 2009) (finding examples of exposure through third-

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<sup>52</sup> ’010 application, December 26, 2013 Response to Office Action, pp. 16-17.

<sup>53</sup> See for example, ’812 application, November 18, 2013 Response to Office Action, p.1 in which Applicant stated “[a]s indicated by the above evidence, Grumpy Cat’s image is famous. Thus, the Mark (as indicative of Grumpy Cat) is therefore famous itself.”

<sup>54</sup> Internet cat celebrity. ’010 application, December 26, 2013 Response to Office Action, p. 19.

parties' permitted or licensed use in various media, including television, live performances, movies, charitable events and merchandising did not direct the attention of potential consumers to identify the outline of the guitar body as an indication of commercial source, and not supportive of acquired distinctiveness of guitar body). Tardar Sauce's receipt of awards also does not tend to show the public associates the Tardar Sauce image with Applicant's goods and services as the awards relate to her status as an Internet meme or Internet cat celebrity and are not recognition directed towards Applicant's goods or services. *See e.g., We Media Inc. v. General Electric Co.*, 218 F. Supp. 2d 463, 68 USPQ2d 1108 1113-1114 (S.D.N.Y. 2002), (evidence of awards for website and magazine show business served "laudable goal" and the "product was well respected within its channels of trade" but did not tend to show the public recognized WEM's marks to signify its products and services), *aff'd* 94 F.App'x. 29 (2d. Cir. 2004); *In re Franklin County Historical Soc'y*, 104 USPQ2d at 1093 (fact that museum was award-winning insufficient for distinctiveness claim).

Applicant has provided no unsolicited media coverage recognizing or referring to the Tardar Sauce image as pointing to Applicant or one particular anonymous source in connection with the '010 and '812 applications' goods and services.<sup>55</sup> Therefore, the

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<sup>55</sup> 4 TTABVUE 14-19. '010 application, December 26, 2013 Response to Office Action, pp. 14, 16-19, 29, 31. Two of the webpages provided are in foreign languages. Websites located outside the United States may have probative value depending on the circumstances, including whether the consuming public in the United States is likely to have been exposed to the foreign website. *In re Florists' Transworld Delivery Inc.*, 106 USPQ2d 1784, 1786 (TTAB 2013). In this case, we do not know the extent of exposure to the public of these websites, but in any event, these websites are not probative as the stories contain the meme

unsolicited media coverage introduced by Applicant fails to show widespread recognition by the relevant public of the Tardar Sauce image as a source-indicator for the applied-for goods and services.

## 2. Social Media and Ganz website use

Applicant also points to its use of social media platforms and website evidence,<sup>56</sup> to support its claim of acquired distinctiveness. Although Applicant provided documentary evidence in connection with the '010 application to corroborate counsel's statements, it did not submit evidence in connection with the '812 application, (Class 28 goods). For that application, Applicant provided website links to the Facebook, Twitter, Instagram, YouTube and Tumblr pages. This is insufficient to make the webpages themselves of record.<sup>57</sup> *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (providing hyperlinks insufficient to make evidence of record). Therefore, we

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image, and not the mark, and do not appear to reference the Tardar Sauce image or the applied-for goods.

<sup>56</sup> The website evidence Applicant provided for the Class 9 and 16 goods ('010 application) and Class 28 goods ('812 application) consists of webpages from licensee Ganz whose website includes Tardar Sauce web pages. '010 application, July 22, 2014 Response to Office Action, pp. 48, 50, 51; '010 application, February 23, 2015 Request for Reconsideration, p. 22 O'Halloran declaration ¶ 12; '812 application, January 22 2015 request for Reconsideration, pp. 40-42; '812 application, June 19, 2014 Response to Office action, pp. 50, 55, 57-59; '812 application, January 22, 2015 Request for Reconsideration, p. 24 O'Halloran declaration ¶ 12.

<sup>57</sup> '812 application, November, 18 2013 Response to Office Action, p. 1. The Examining Attorney did not advise Applicant regarding this deficiency in the December 19, 2013 Office Action. But even if we consider the Examining Attorney to have waived any objection to these website links, only the website address itself would be of record. *In re HSB Solomon Associates LLC*, 102 USPQ2d 1269, 1273-74 (TTAB 2012) (even if Examining Attorney was considered to have waived objection to website address, only the website address itself would be of record as "the Board would not utilize the address to access the site and consider whatever content appeared.").

consider the social media evidence only in connection with the Class 9, 16 and 41 goods and services in the '010 application.

Following are the social media platforms that Applicant's counsel has identified with accompanying page images:<sup>58</sup>

The Twitter page (twitter.com) of Tardar Sauce, has over 125,000 followers.

The official Instagram page (instagram.com) for Tardar Sauce (managed by licensee Ganz) has more than 130,000 followers.

The official Facebook page (facebook.com) for Tardar Sauce (managed by licensee Ganz) has over 2.5 million likes.<sup>59</sup> A later Facebook page exhibit provided by Applicant shows 7,498,419 likes.<sup>60</sup>

The official YouTube channel (youtube.com) for Tardar Sauce has over 145,000 subscribers and over 24 million views.<sup>61</sup>

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<sup>58</sup> '010 application, December 26, 2013 Response to Office Action, pp. 1, 32, 33, 34 and 36; '010 application, February 23, 2015 Request for Reconsideration, p. 26. The O'Halloran declarations also testify as to Applicant's Pinterest account but no exhibit has been provided to show use. '010 application, February 23, 2015 Request for Reconsideration, p. 22 O'Halloran declaration, ¶ 12; '812 application, January 22, 2015 Request for Reconsideration, p. 24 O'Halloran declaration ¶ 12.

<sup>59</sup> Counsel also made an unverified and uncorroborated statement about Applicant's "reach" of this Facebook page.

<sup>60</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 7, 26.

<sup>61</sup> '010 application December 26, 2013 Response to Office Action, p. 34.

Twitter:



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<sup>62</sup> *Id.* at 32 (Twitter).

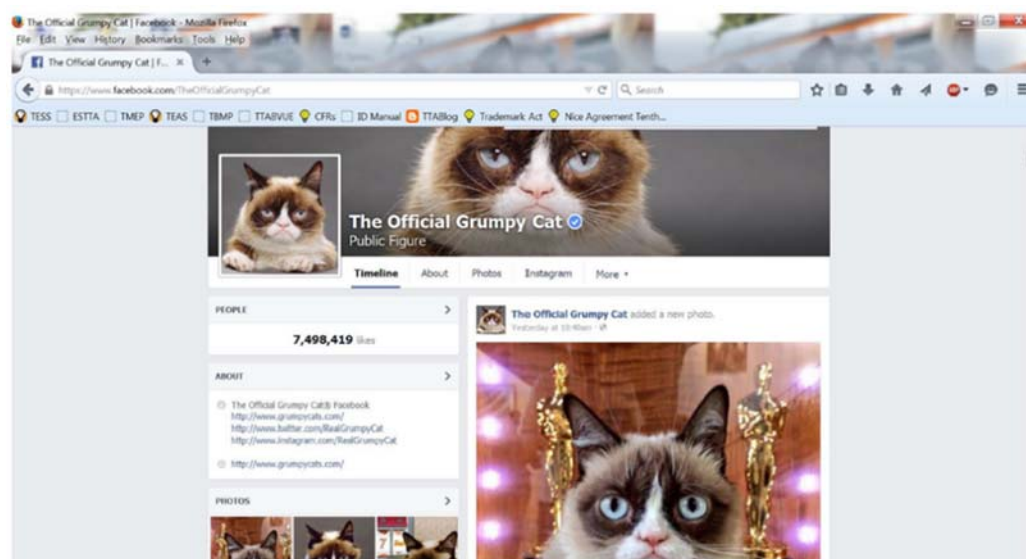
<sup>63</sup> *Id.*



Facebook:



64

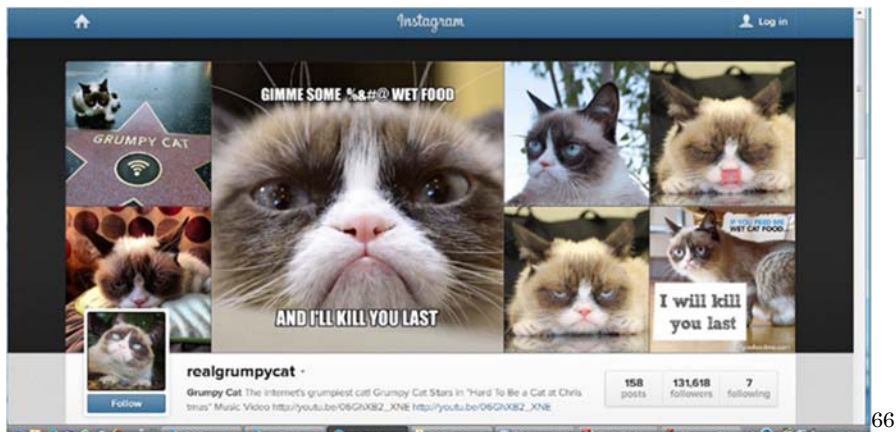


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<sup>64</sup> *Id.* at 33 (Facebook).

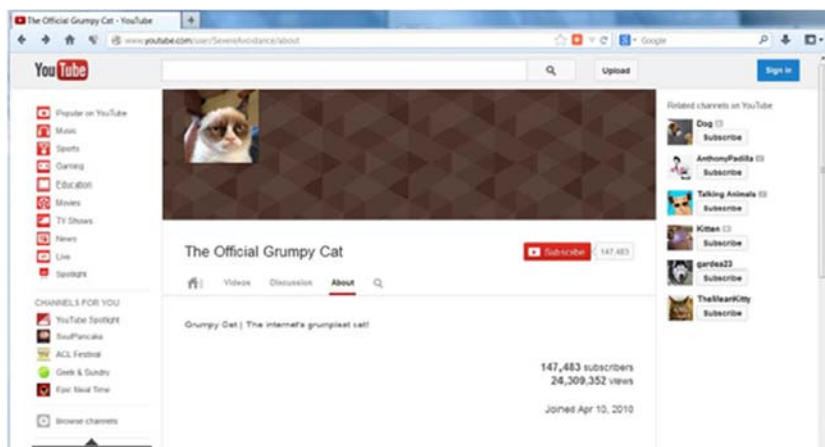
<sup>65</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 26. (Facebook).

Instagram:



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YouTube:



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Applicant has not explained how it has used these platforms to promote the Tardar Sauce image in connection with the '010 application's applied-for goods and services rather than promoting Tardar Sauce herself. *Cf. In re Semel*, 189 USPQ 285, 287 (TTAB 1975) ("in evaluating the significance of advertising figures . . . it is necessary to consider not only the extent of advertising but also whether the use of

<sup>66</sup> '010 application, December 26, 2013 Response to Office Action, p. 36 (Instagram).

<sup>67</sup> *Id.* at 34. (YouTube).

the designation [or design] therein has been of such nature as to create in the minds of the purchasing public an association of the designation [or design] with the user and/or his goods”). The Facebook and Instagram page exhibits do not show use of the Tardar Sauce image and are not probative.<sup>68</sup> *See e.g., Nazon v. Ghiorse*, 119 USPQ2d 1178, 1184 n.11 (TTAB 2016) (use of mark’s effect on consumers could not be determined because there was no documentary evidence submitted showing how the mark was used on two additional Facebook pages, nor was there any evidence to establish use of the term as a mark). The provided Twitter page exhibit has limited probative value for the same reasons. Although the profile photo on the page is closer to the applied-for image, it is not the same because it is in black and white, includes the words “Grumpy Cat,” and includes background matter. *See In re Mogen David Wine Corp.*, 372 F.2d 539, 152 USPQ 593, 595 (CCPA 1967) (where advertising depicting the bottle design sought to be registered always featured the word mark MOGEN DAVID, such evidence failed to prove acquired distinctiveness in the design itself); *In re Franklin County Historical Soc’y*, 104 USPQ2d at 1093 (finding examples of distinctiveness insufficient as none shows use of the proposed mark, “CENTER OF SCIENCE AND INDUSTRY,” without the acronym COSI). The YouTube page exhibit also has a profile photo that is somewhat similar to the applied-for image, but it more closely resembles the meme image as it includes someone’s hand and background matter. Aside from the displayed YouTube image being different than the Tardar

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<sup>68</sup> ’010 application, December 26, 2013 Response to Office Action, pp. 33, 36; ’010 application, February 23, 2015 Request for Reconsideration, p. 26.

Sauce image, this use would be viewed as nothing more than a profile photo resembling the meme image. *Cf. Nazon v. Ghiorse*, 119 USPQ2d at 1184 (discounting asserted use of mark on Twitter page, noting that it appears in the nature of a Twitter handle rather than as a trademark; no evidence to establish use of term as a mark). The Facebook exhibit shows 7,498,419 likes,<sup>69</sup> the Instagram exhibit shows 131,618 followers, and the Twitter exhibit shows 125,134 followers, but these figures alone, without any association with the Tardar Sauce image, do not establish an association between the Tardar Sauce image and Applicant's Class 9, and 16 goods or Class 41 services.<sup>70</sup> The fact that Applicant's YouTube channel exhibit shows over 145,000 subscribers and over 24 million views, while perhaps demonstrating the popularity of Applicant's videos, does not reveal the extent, if any, to which consumers perceive the Tardar Sauce image as a source indicator of the videos, for Applicant's Class 41 services. *Cf. Braun Inc. v. Dynamics Corp.*, 975 F.2d 815, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992) ("[L]arge consumer demand for Braun's blender does not permit a

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<sup>69</sup> The Facebook page submitted with the '010 application, December 26, 2013 Response to Office Action, p. 32, shows 2,542,631 likes while the Facebook page submitted with the '010 application, February 23, 2015 Request for Reconsideration, p. 26, shows 7,498,419 likes. The growth in "likes" without the association of the Tardar Sauce image is not probative.

<sup>70</sup> '010 application, December 26, 2013 Response to Office Action, p. 32. The exhibit provided does not display any actual tweets on the page but displays the figure of 1320 tweets. As no tweets are displayed, it is not clear that any of the 1320 tweets relate to the applied-for goods and services. There also is no indication what impact the tweets have on the purchasing public (e.g., the potential reach of the tweets and whether the followers see the tweets i.e., engagement, engagement rate and impressions, and retweets) as no Twitter analytics have been provided. Caroline Mrohs, *How Many Likes Did It Get? Using Social Media Metrics to Establish Trademark Rights*, 25 Cath. U. J. L. & Tech 154, 164 (2017). ("When account owners can use metrics to track how the public and their relevant consumer base receive their social media, there is more assurance that their followers are making a connection between the content produced by the accounts (including trademarks) and who the account owners are (the source).")

finding the public necessarily associated the blender design with Braun.”); *555-1212.com Inc. v. Commc’n House Int’l Inc.*, 157 F. Supp.2d 1084, 59 USPQ2d 1453, 1459 (N.D. Cal. 2001) (“The Media Metrix report only provides that a large number of Internet users visit plaintiff’s web site [555-1212.com]. It does not provide any reasonable inference to conclude that these users perceive plaintiff’s domain name as a brand name instead of a merely descriptive Internet address”).

Turning to licensee Ganz’s manner of use of the Tardar Sauce image on the Ganz website, shown below, the only webpage provided showing the image generally references “cool Grumpy Cat gear” but does not specifically identify the Class 9, 16 or 28 goods.<sup>71</sup> While there is one web page that shows a window cling,<sup>72</sup> which may be covered under the Class 28 goods, the Tardar Sauce image is not displayed on this webpage and no tag or label with the image is shown on the good.<sup>73</sup>

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<sup>71</sup> July 22, 2014 Response to Office Action ’010 application, pp. 48, 50, 51; ’812 application, January 22, 2015 Request for Reconsideration, pp. 40-42; ’812 application, June 19, 2014 Response to Office action, p. 50.

<sup>72</sup> A window cling is a stuffed toy with suction cups that allows attachment to a window.



<sup>73</sup> ’812 application, January 22, 2015 Request for Reconsideration, p. 40.

<sup>73</sup> *Id.*



Ganz Website:

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The other related Ganz webpages include photographs of store displays of Applicant's other goods (stationary, sticky pads, and coasters) and not the applied-for Class 9, 16 and 28 goods.<sup>75</sup> Applicant's own website grumpycats.com, shown below, does show use of the image in connection with the Class 41 services.<sup>76</sup>

Applicant's website:



. However we have no information

related to this website from which we could infer consumer exposure. *See In re*

<sup>74</sup> '812 application, January 22 2015 Request for Reconsideration, p. 41; '812 application, June 19, 2014 Response to Office Action, p. 50; '010 application, July 22, 2014 Response to Office Action, p. 48.

<sup>75</sup> We further note that in many of these displays, the Tardar Sauce image looks more like the content of the product rather than the mark for the product. For example, the Tardar Sauce image is displayed on the face of the coasters and sticky pads and predominates, appearing more as a decorative picture than as a trademark. '010 application, July 22, 2014 Response to Office Action, pp. 45-46, 49.

<sup>76</sup> Specimen '010 application p. 9; '010 application, July 22, 2014 Response to Office Action, p. 11.

*Brouwerij Bosteels*, 96 USPQ2d at 1424 (although mark displayed on website, no information with respect to the number of visitors to the website to afford a determination of whether a significant number of people in the United States have even viewed the alleged mark at the website). But even if we had this information as to unique visitors, it may not necessarily support a reasonable inference of acquired distinctiveness as to those particular services given that the website is not devoted strictly to the offering of videos. *Cf. DeGidio v. West Grp.*, 355 F.3d 506, 69 USPQ2d 1538, 1543 (6th Cir. 2004) (“[m]ere use of a website does not equal identification with a particular provider”). We find the social media and website evidence does not tend to support a finding of acquired distinctiveness of the Tardar Sauce image either because the information is insufficient to provide such an inference or these platforms do not direct the attention of consumers or potential consumers to the applied-for mark and goods or services.

3. Declarations from licensees.

The following summarizes the declaration testimony of Applicant’s licensees for plush toys, calendars, software application, notepads and greeting cards:

a. Calendars

Lori Conley, Senior Director, Marketing Services for ACCO Brands USA, LLC (“ACCO”) states that ACCO has licensed the Tardar Sauce image in connection with boxed and miniature-wall decorative calendars that bear the image, that ACCO uses the image in marketing the goods and affixes the image to packaging and tags, and

that she is making the declaration in the belief that the image is distinctive.<sup>77</sup> The declaration also states that the image's fame caused ACCO to enter into a licensing agreement for the products with Applicant, and that its success in selling the products "may show that the purchasing public views the Mark as an indicator of origin for Grumpy Cat."<sup>78</sup>

Ms. Conley's testimony lacks specificity as it provides no information (e.g., advertising and sales figures of calendars) from which we could infer consumer exposure to the image. *See In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 345, 348 (CCPA 1975) (evidence fails to disclose information from which the number of people exposed to the design could be estimated—such as circulation of the publications in which the advertisements appear, advertising expenditures, number of advertisements published, volume of sales of the soccer balls, and the like). Ms. Conley's statement that ACCO's success in selling the products "may show" that the purchasing public views the image as a source indicator is equivocal, speculative and conclusory. In any event, the Board will not substitute a witness's opinion for our evaluation of the facts. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1402 (TTAB 2010). ACCO's business motivations for entering into a licensing arrangement with Applicant do not support an inference of acquired distinctiveness.

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<sup>77</sup> 4 TTABVUE 28. '010 application, February 23, 2015 Request for Reconsideration, p. 24, Conley declaration, ¶¶ 1, 3, 5, 6.

<sup>78</sup> 4 TTABVUE 28. '010 application, February 23, 2015 Request for Reconsideration, p. 24, Conley declaration, ¶¶ 4, 7.



Ms. Conley's declaration is insufficient to support a finding of acquired distinctiveness of the image in connection with calendars.

- b. Ganz - software application for mobile phones, greeting cards, and note cards, and plush toys

Susan O'Halloran, Communications Manager of Ganz ("Ganz") states that "the unique recognition power and fame of Grumpy Cat" caused Ganz to enter into licensing agreements for use of the image in connection with websites and certain products, and that the image is "inextricably connected to the distinctive and famous Grumpy Cat" who the public immediately "identifies as being Grumpy Cat" rather than an ordinary cat.<sup>79</sup> More than 16,000 stock keeping units ("skus") for greeting cards and note cards using the image were manufactured for sale in the United States.<sup>80</sup> Ganz's software app. using the Tardar Sauce image has more than 70,000 users. In describing the manner of use of the image, O'Halloran explains that it is affixed to signage and displays in connection with the licensed goods (software apps., notecards, and greeting cards). The image also is used in connection with a wide range

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<sup>79</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 21 O'Halloran declaration ¶¶ 6, 7, 9; '812 application, January 22, 2015 Response to Office Action, p. 23 O'Halloran declaration ¶¶ 5, 6, 9.

<sup>80</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 21 O'Halloran declaration, ¶ 10; '812 application, January, 22, 2015 Response to Office Action, p. 23 O'Halloran declaration ¶ 10 Although Applicant has characterized this testimony as referencing sales of goods, the declaration merely states that numerous skus were manufactured and that the goods for these skus are being sold in the United States.

of marketing materials, handouts, trade advertising, showroom fixtures,<sup>81</sup> on Ganz's corporate website, and on social media (Facebook, Instagram, and Pinterest), as managed by Ganz.<sup>82</sup> Ganz spent one and a half years in marketing, design, catalog production, product development and sales efforts in developing and promoting the "Grumpy Cat Products."<sup>83</sup> In O'Halloran's opinion, the mark is "quite well established throughout the United States in connection with Grumpy Cat products" and consumers purchase the products because they associate the mark as denoting authentic Grumpy Cat Limited merchandise.<sup>84</sup> The declaration also states that Applicant itself supports the Tardar Sauce image through social media, other

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<sup>81</sup> The Tardar Sauce image has been displayed on trade show booths in connection with stuffed toys. *See e.g.*, '812 application, June 19, 2014 Response to Office Action, p. 49.



<sup>82</sup> '010 application; February 23, 2015 Request for Reconsideration, p. 22, O'Halloran declaration, ¶ 11. Apart from the declaration, webpages have been provided that corroborate O'Halloran's statements regarding Facebook. '010 application, December 26, 2013 Office Action p. 33; '010 application, February 23, 2015 Request for Reconsideration, p. 26.

<sup>83</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 22, O'Halloran declaration ¶ 16; '812 application, January, 22, 2015 Response to Office Action, p. 24 O'Halloran declaration ¶ 16.

<sup>84</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 22, O'Halloran declaration, ¶¶ 13, 14; '812 application, January, 22, 2015 Response to Office Action, p. 24 O'Halloran declaration ¶ 12.

merchandising, and Tardar Sauce personal appearances.<sup>85</sup> The January 20, 2015 O'Halloran declaration relating to plush toys repeats almost all of the statements made in the February 23, 2015 declaration, but excludes information related to the Class 9 and 16 goods. The declaration indicates that the manner of use for the plush toys is labels and tags, and 100,000 pieces of 15 skus of plush toys were offered for sale by Ganz.<sup>86</sup>

First, Ganz's entering into a licensing agreement with Applicant due to the alleged "fame" of Tardar Sauce does not reflect evidence of distinctiveness of the image as a trademark but an attempt to capitalize on Tardar Sauce's popularity for commercial use. Second, we have already addressed Applicant's social media efforts, (both managed and not managed by Ganz) and the Ganz website, above. Ms. O'Halloran's general reference to Applicant's own efforts at merchandising and personal appearances lack sufficient specifics to provide support for a claim of acquired distinctiveness of the image; we discussed above that the personal appearances identified by applicant in the record are unrelated to the mark and the applied-for goods.

Third, Ganz's one and a half years spent in product development, catalog design and catalog production in connection with the Class 9, 16 and 28 goods relate to the development and production of the goods themselves, rather than efforts made in

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<sup>85</sup> '010 application, February 23, 2015 Request for Reconsideration, p. 22 O'Halloran declaration ¶ 17; '812 application, January 22, 2015 Request for Reconsideration, p. 24 O'Halloran declaration ¶ 17.

<sup>86</sup> '812 application, January, 22, 2015 Response to Office Action, p.23 O'Halloran declaration ¶ 10.

connection with establishing acquired distinctiveness with the consuming public. Ganz's promotional efforts with respect to the Tardar Sauce image are largely in connection with industry trade shows, trade magazines and trade catalogs but Ms. O'Halloran's statements lack key information such as trade show attendance at its booth and circulation figures for the trade magazine and trade catalogs to support a claim of distinctiveness. *See Apollo Med.*, 123 USPQ2d at 1856 (Board found promotional efforts insufficient to support distinctiveness, noting that there was no specific information regarding trade show visitors and trade publication circulation). Although Ms. O'Halloran provided information as to the number of skus manufactured for distribution of the goods, we have no information related to the number of units sold or sales volume from which we could infer distinctiveness. *See In re Soccer Sport Supply*, 184 USPQ at 348 (evidence fails to disclose information from which the number of people exposed to the design could be estimated—such as volume of sales of the soccer balls). As to the software application, while figures for the number of users (70,000) has been provided, it has limited probative value because this information lacks a meaningful context e.g., comparison with competitive products and market share. That is, it tells us very little about whether consumers of Applicant's software applications have come to recognize the Tardar Sauce image as a source indicator. We conclude that the O'Halloran declarations are not sufficiently probative to support a claim of distinctiveness.

c. Gund – Plush Toys

Bruce Scott Raiffe, President of the Gund division of Enesco LLC (“Gund”), states that Tardar Sauce is “a famous feline,” “beloved meme,” “widely-famous,” and her fame caused Gund to enter into a licensing agreement with Applicant.<sup>87</sup> Gund created 20 skus of plush toy products and spent in excess of \$250,000 for development of the plush toys and for related advertising using the Tardar Sauce image.<sup>88</sup> The image is affixed to packaging and tags.<sup>89</sup> According to Raiffe, the plush toy products are “an inarguable success” and “bona fide hits” generating \$5 million in sales.<sup>90</sup> Raiffe also states that the owner of Tardar Sauce engages in merchandising, licensing, and personal appearances using the mark but does not provide any specific details.<sup>91</sup>

As stated with regard to the other licensees, Gund’s entering into a licensing agreement with Applicant due to the alleged “fame” of Tardar Sauce, is not evidence

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<sup>87</sup> ’812 application, January 22, 2015 Request for Reconsideration, p. 20, Raiffe declaration ¶¶ 4-5.

<sup>88</sup> ’812 Application, January 22, 2015 Request for Reconsideration, p. 20 Raiffe declaration ¶¶ 5, 9.

<sup>89</sup> ’812 application, January 22, 2015 Request for Reconsideration, p. 21 Raiffe declaration ¶ 19. *See* ’812 application, January 22, 2015 Response to Office Action p. 1, specimen; ’812 application, November 18, 2013 Response to Office Action, p. 22.

<sup>90</sup> ’812 application, January 22, 2015 Request for Reconsideration, p. 20 Raiffe declaration ¶ 12.

<sup>91</sup> ’812 application, January 22, 2015 Request for Reconsideration, p. 20 Raiffe declaration ¶ 11. In Raiffe’s opinion, the success in marketing and selling the products shows the mark is an indicator of origin. ’812 application, January 22, 2015 Request for Reconsideration, p. 21 Raiffe declaration ¶ 22. But success in marketing does not necessarily permit a finding that the Tardar Sauce image is a source indicator. *See Braun*, 24 USPQ2d at 1133 (high consumer demand for blender “does not permit a finding public necessarily associated the blender design” with a single source). Raiffe also states that consumers associate the Tardar Sauce image with Applicant. ’812 application, January 22, 2015 Request for Reconsideration, p. 20 Raiffe declaration ¶ 14. As stated, the ultimate conclusion is left to the fact finder, not witness opinion.

of distinctiveness, but an attempt to capitalize on Tardar Sauce's popularity for commercial use. Raiffe's testimony as to Applicant's own efforts to support the mark (i.e., licensing, merchandising, and Tardar Sauce personal appearances) lack specificity.<sup>92</sup> The Raiffe declaration also lacks specific information about the amount of advertising expenditures because the figure provided does not distinguish between advertising and development of the product. The \$5 million sales figure for the plush toys is substantial, and Mr. Raiffe testified that the sales establish that the stuffed toys are "bona fide hits." However, we find that the \$5 million sales volume, while demonstrating commercial success for the plush toy, does not demonstrate that purchasers view the Tardar Sauce image as an indicator of source. *See Braun*, 24 USPQ2d at 1133 (high consumer demand for blender "does not permit a finding the public necessarily associated the blender design" with single source); *In re Bongrain*

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<sup>92</sup> There is one example in the record of a personal appearance by Tardar Sauce in connection



with the Gund products . '812 application, January 22, 2015 Request for Reconsideration, p. 44. But a greater number of personal appearances would be required to support a distinctiveness claim. *See Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., et al.*, 467 F. Supp. 366, 201 USPQ 740, 744-45 (S.D.N.Y. 1979), (distinctiveness of Dallas Cowboy cheerleader uniform based in part on 90 dance performances and personal appearances (150-200 per year) over a period of seven years), *aff'd*, 604 F.2d 200, 203 USPQ 161 (2d Cir. 1979). The previously mentioned Tardar Sauce personal appearances on television, at conferences, and at Disneyland appear unrelated to the Class 28 goods. *Cf. Stuart Spector Designs*, 94 USPQ2d at 1549 (exposure of proposed mark through third-parties' permitted or licensed use in various media, including television, live performances, charitable events not supportive of acquired distinctiveness because these uses did not direct the attention of potential consumers to identify the proposed mark as an indication of commercial source).

*Int'l (American) Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) (growth in sales may be indicative of popularity of product itself rather than recognition as denoting origin). We conclude that the Raiffe declaration is not sufficiently probative to support acquired distinctiveness of the Class 28 toys.

For the reasons discussed and considering the evidence in the record as a whole, we find that Applicant has not demonstrated acquired distinctiveness of the Tardar Sauce image in connection with its Class 9, 16 or 28 goods or the Class 41 services.

#### IV. Amendment to Supplemental Register

Applicant has stated in its requests for reconsideration, appeal briefs and reply briefs that it “is reserving its right to request an alternative amendment to seek registration on the Supplemental Register in the event the Board affirms both of such refusals.”<sup>93</sup>

However, Applicant’s statement of an intention to amend to the Supplemental Register at a later date does not secure that right. *In re Integrated Embedded*, 120 USPQ2d 1504, 1511, (TTAB 2016). “Our prior precedents are clear that once the Board has rendered a final decision, a request to amend to the Supplemental Register is not possible.” *Id.* at 1512. *See also* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g),

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<sup>93</sup> ’812 application, January 22, 2015 Request for Reconsideration, p.1; ’010 application, February 23, 2015 Request for Reconsideration, p. 1; 19 TTABVUE 23; 22 TTABVUE 9. During prosecution, the Examining Attorney advised Applicant multiple times of the option of amending to the Supplemental Register; however, Applicant did not amend the ’010 and ’812 applications to seek, in the alternative, registration on the Supplemental Register. 21 TTABVUE 4, 7, 19, nn. 6, 7, 12, 79. Although in its reply brief Applicant characterizes its requests to amend to the Supplemental Register as an alternative amendment, Applicant’s filings merely indicate that it is “reserving its right to request an alternative amendment,” in the future. 22 TTABVUE 9.

(the rule provides for reopening after appeal only for purposes of a disclaimer). In view of the foregoing, to the extent Applicant seeks leave to file a request to amend to the Supplemental Register, the request is denied as untimely.

**Decision:** The Section 2(e)(1) refusal to register Applicant's mark is affirmed with respect to Classes 9, 16 and 41 in Application Serial No. 85838010 and with respect to Class 28 in Application Serial No. 85836812. The refusal to register Applicant's mark based on the failure to prove acquired distinctiveness is affirmed with respect to Classes 9, 16 and 41 in Application Serial No. 85838010 and Class 28 in Application Serial No. 85836812.